

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Satellite Delivery of Network Signals)
to Unserved Households for)
Purposes of the Satellite Home)
Viewer Act)
)
Part 73 Definition and Measurement)
of Signals of Grade B Intensity)

CS Docket No. 98-201
RM No. 9335
RM No. 9345

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF MORGAN MURPHY STATIONS

Morgan Murphy Stations ("Morgan Murphy"), parent company of Apple Valley Broadcasting, Inc., licensee of KAPP-TV Yakima, Washington and KVEW-TV Kennewick, Washington; Spokane Television, Inc., licensee of KXLY-TV Spokane, Washington; and Television Wisconsin, Inc., licensee of WISC-TV Madison, Wisconsin, by counsel, hereby submits Comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

I. Introduction

PrimeTime 24's flagrant disregard of the Satellite Home Viewer Act ("SHVA") provides the impetus for this NPRM due to the FCC's concern that over two million subscribers stand to lose satellite direct -to-home ("DTH") service which PrimeTime 24 provided to them unlawfully. NPRM at ¶7. In fact, two federal courts have held that Prime Time 24 has engaged in a pattern

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of purposefully violating the requirements of SHVA. The United States District Court in Raleigh, North Carolina found that " PrimeTime 24 has ignored or turned a blind eye [to the requirements of the SHVA] and thus willfully or repeatedly provided network programming to subscribers [in violation of the] SHVA."¹ Similarly, the United States District Court for the Southern District of Florida found that "the evidence demonstrates that PrimeTime 24 knew of the governing legal standard [of the SHVA] but nevertheless chose to circumvent it."²

If in fact the FCC adopts its proposal to shrink the Grade B contour for purposes of the SHVA, as discussed below, it would hand PrimeTime 24 and the rest of the DTH industry an enormous victory while causing immeasurable long-term harm to free, over-the-air broadcasting. The Commission will be sending the wrong message that breaking the law sometimes has its rewards. Such FCC action would not only be poor precedent, but it would turn the administrative process and indeed the public interest standard completely on its head. Rather than adopt the quick fix solution proposed by the DTH industry, the FCC should seek a long-term solution to the shortcomings of the SHVA that strikes a proper balance between promoting competition to cable and preserving free over-the-air broadcasting.

¹ *ABC, Inc. v. PrimeTime 24, Joint Venture*, __ F.Supp.2d __, 1998 WL 544286, 544297 (M.D. N.C., July 16, 1998) (Case No. Civ. A. 1:97CV00090).

² *CBS, Inc. et al. v. PrimeTime 24 Joint Venture*, Order Affirming in Part and Reversing in Part Magistrate Judge Johnson's Report and Recommendations, 9 F.Supp.2d 1333 (S.D. FL., May 13, 1998); *CBS, Inc. et al. v. PrimeTime 24 Joint Venture*, Supplemental Order Granting Plaintiffs' Motion for Preliminary Injunction (S.D. FL., July 10, 1998) (No. 96-3650-CIV).

II. The Scope of the SHVA is Purposefully Narrow in Order to Protect the Broadcast Network-Affiliate Relationship and the Policy of Localism

In enacting the SHVA in 1988, Congress granted DTH satellite providers a limited exception to the exclusive programming copyrights enjoyed by television networks and their affiliates. Specifically, the SHVA allows DTH providers to enjoy the benefits of the compulsory license which empowers them to deliver distant network television signals only to persons who reside in "unserved households" without having to negotiate with the copyright holders for such rights. An "unserved household" with respect to a particular television network station is defined by SHVA to mean a household that:

"(A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity (as defined by the FCC) of a primary network station affiliated with that network, and

(B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network."³

As the Commission points out, Congress quite purposefully forged a limited compulsory copyright license with the enactment of SHVA in recognition of the vital importance that the network-affiliate relationship plays in delivering free, over-the-air television to U.S. homes, and because of the value of localism in broadcasting.⁴ Accordingly, Congress granted the SHVA copyright exception only for those non-cable subscribing households that are unable to receive a

³17 U.S.C. § 119(d)(10).

⁴ H.R. Rep. 100-887(I), at 19-20.

Grade B quality over-the-air signal who nevertheless Congress believed should be entitled to receive broadcast network programming.

III. Determining The "Grade B Quality Signal" Should Be Based Either On The Commission's Current Definition of Grade B or the Actual Signal Strength as Measured at the Individual Household.

As noted by the Miami and Raleigh federal district courts, Congress used the Grade B standard when it defined "unserved households" because it wanted an objective measure of a television signal's strength.⁵ This objective measure is an important proxy to actual measurements in that it makes administration of and compliance with the SHVA easier and more cost-effective than measuring actual signal strength at individual households. However, given the delicate balance that Congress struck by permitting DTH providers to deliver distant network signals into homes unable to receive a Grade B signal, while protecting free, over-air-broadcasting, the Commission lacks authority to disrupt this balance by *sua sponte* modifying the definition of the Grade B signal contour for purposes of the SHVA. A reduction in the size of the Grade B contour for purposes of the SHVA would have the effect of expanding the purposefully narrow scope of the statute and would be clearly contrary to Congressional intent.

In support of its conclusion that Congress did not freeze the definition of the Grade B contour as it is used in the SHVA, the Commission narrowly focuses on the fact that Congress did not reference specific dBu levels -- which the Commission uses in determining a station's Grade B contour under Section 73.683 -- when Congress incorporated the Grade B concept into

⁵ See *CBS v. PrimeTime 24*, Order, 9 F.Supp.2d at 1339; *ABC v. PrimeTime 24*, Court Opinion, 1998 WL 544286.

the SHVA. Further, the Commission cites the fact that "nothing in the SHVA or legislative history indicates that Congress intended to freeze the value of the Grade B contour when it passed the law in 1988 or when it renewed it in 1994." NPRM at ¶20. Finally, the FCC interprets two Supreme Court cases, *Lukhard v. Reed*, 481 U.S. 368 (1989), and *Helvering v. Wilshire*, 308 U.S. 90 (1939) to support its tentative conclusion that Congress did not freeze the definition of the Grade B contour in enacting the SHVA thereby paving the way for the FCC to modify this standard. NPRM at ¶21.

Contrary to the Commission's conclusion however, the FCC lacks the necessary authority to redefine the Grade B signal contour for purposes of the SHVA. In this regard, Congress did not direct the Commission to conduct a rulemaking on the definition of the Grade B contour. Moreover, the SHVA is a component of a copyright statute under Title 17 of the U.S. Code, not a communications law under Title 47, and the Commission therefore lacks the authority to substantively revise a regulation that falls outside of its purview. Further, the Commission's analysis of *Lukhard v. Reed*, and *Helvering v. Wilshire* at most suggests that strictly in the abstract and absent a contrary indication from Congress, an administrative agency may, under its general enabling legislation, modify a standard referenced by Congress in a given article of legislation. This analysis however has no bearing where, as in the instant matter, Congress' intent behind SHVA which was to adopt a narrow exception to the copyright laws while protecting local broadcasting and the network affiliate relationship. Any post-facto liberalization of the Grade B signal contour by the Commission would defy Congress' clear intent.

Shrinking the coverage area of broadcast stations by allowing DTH providers to import

distant network signals to households within the station's current Grade B contour would have a detrimental effect on the network-affiliate relationship since, in effect, the station's affiliated network would be siphoning off the station's viewers. In this regard, the effect of reducing the Grade B contour to a service area that approaches the size of the smaller Grade A service contour as the Commission proposes would have a devastating effect on the Morgan Murphy stations. In fact, based on the number of households that fall between the Grade A and B signal contours of stations KVEW Kennewick, Washington, KXLY-TV Spokane, Washington, and WISC-TV Madison, Wisconsin, on average these stations could each potentially lose 15% of the station's viewing audience and advertising revenues as a result of such FCC action. This loss in audience and advertising revenues would have a devastating effect on these stations' ability to continue to provide quality free, over-the-air television programming in their respective communities. Accordingly, contrary to its tentative conclusion in the NPRM, because of the devastating effect any change in the Grade B service contour would have on broadcasters, and given Congress' concern for protecting the network-affiliate relationship and local broadcasting, the FCC does not have the authority to liberalize the SHVA by shrinking broadcasters' protected Grade B service area.

IV. The Commission Should Formally Request That Congress Revise the SHVA to Allow DTH Providers to Deliver Local Signals

As stated above, in lieu of seeking a quick fix to the problem of determining whether a household is unserved for purposes of the SHVA, the FCC working with Congress should seek

a long-term, comprehensive solution to ensure that all DTH subscribers are able to receive local television broadcast signals. In this regard, Morgan Murphy urges the Commission to propose a formal recommendation to Congress to adopt a "local-into-local" regulatory scheme for DTH providers with comparable must-carry/retransmission consent and network non-duplication rules applicable to cable. By permitting DTH satellite providers to deliver local broadcast signals to consumers, the DTH service would emerge as a truly competitive substitute for cable, without compromising Congress' goal of protecting the network-affiliate relationship and advancing the goals of localism.

Morgan Murphy assures the Commission that until such time as Congress acts to amend the SHVA to permit DTH providers to offer local broadcast signals, the Morgan Murphy stations will continue to work diligently with individual households in their currently defined markets to ensure these homes are not deprived of receiving valuable network programming. In this regard, consistent with the SHVA and Congressional intent, the Morgan Murphy stations will continue to make this determination based on actual signal strength at the individual household, not a new predictive model which was never intended under the SHVA.

V. Conclusion

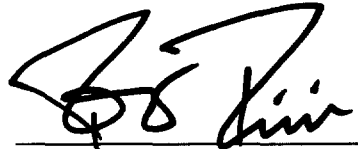
The FCC lacks the authority to liberalize the SHVA – a purposefully narrow exception to the copyright laws -- by shrinking the Grade B service contour of television broadcasters. Such FCC action would harm the network-affiliate relationship and deal a serious set-back to the goals of localism. Accordingly, Morgan Murphy Stations respectfully requests that the Commission

not adopt its proposal to modify the Grade B contour for purposes of the SHVA. Rather, the Commission should adopt a formal recommendation to Congress to revise the SHVA to permit DTH providers to provide local broadcast signals to their subscribers.

Respectfully submitted,

Morgan Murphy Stations

By:

A handwritten signature in black ink, appearing to read "Rini", written over a horizontal line.

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